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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF OKLAHOMA and STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

OKLAHOMA AND TEXAS' RESPONSE IN OPPOSITION TO NEW MEXICO'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

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Oklahoma and Texas (Plaintiffs) hereby respond to New Mexico's Motion for Leave to File Supplemental Answer. New Mexico's motion seeks leave of the Court to file a supplemental answer containing a supplemental affirmative defense of laches. In an attempt to support its motion and thereby raise a new affirmative defense, New Mexico has substantially misstated the allegations in Plaintiffs' Complaint and Supplemental Complaint. Plaintiffs request that, if the Court grants New Mexico leave to file a supplemental answer, it strike New Mexico's untimely affirmative defense.

I.

NEW MEXICO HAS SERIOUSLY MISCHARACTERIZED PLAINTIFFS' COMPLAINT AND SUPPLEMENTAL COMPLAINT

1. *The Supplemental Complaint did not change the allegations in the Complaint regarding the reservoir*

capacity in New Mexico subject to the 200,000 acre-foot limitation in Article IV(b) of the Compact. New Mexico alleges that the third and fourth sentences of paragraph 1 of the Supplemental Complaint alter the meaning of the Complaint "by alleging that reservoir capacity in place below Conchas Dam in excess of 200,000 acre-feet is in violation of Article IV(b), regardless of whether the reservoirs store water originating above or below Conchas Dam." (New Mexico's Memorandum in Support of Motion, pp. 3-4) These sentences, which summarize the allegations in paragraphs 9-12 of the Complaint, do not allege that waters originating above Conchas Dam are subject to the Article IV(b) limitation. Like paragraphs 9-12 of the Complaint, these sentences reflect Plaintiffs' consistent interpretation of the Compact that the Article IV(b) limitation on conservation storage in New Mexico applies to all reservoir storage capacity in the Canadian River basin below Conchas Dam and that all waters entering those reservoirs are "waters which originate in the drainage basin of Canadian River below Conchas Dam" as that phrase is used in the Compact.

New Mexico has long evidenced its understanding of Plaintiffs' interpretation of the Article IV(b) limitation. In its December 4, 1987, Answer to the Complaint, New Mexico disputed the same interpretation which it now contends was raised for the first time in the Supplemental Complaint. Paragraph 9 of New Mexico's Answer to paragraph 9 of the Complaint states, in pertinent part, that

> New Mexico denies that Article IV(b) of the Compact refers to reservoir storage capacity physically in place below Conchas Dam. . . .
>
> The same reservoirs that have a limited capacity available for the storage of waters arising below Conchas Dam may have an additional unlimited capacity for the storage of waters arising above Conchas Dam in the Canadian River basin. The place of origin of water, not the place of its storage, controls.

(New Mexico's Answer, p. 4)

It is disingenuous and untenable for New Mexico to now contend that the Supplemental Complaint in any way alters the meaning of the Complaint concerning New Mexico's violation of Article IV(b) of the Compact. New Mexico fully understood and disputed these allegations in its Answer and no Supplemental Answer is required.

2. *The Supplemental Complaint did not change the original cause of action.* New Mexico contends that the Supplemental Complaint "changes the original cause of action, excess reservoir capacity, by adopting a cause of action based on excess storage of water." (New Mexico's Memorandum in Support of Motion, p. 4) This allegation ignores the distinction between the facts alleged and the cause of action. A cause of action is the unlawful violation of a right which the facts show. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 13 (1951); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927). The Supplemental Complaint merely alleges new facts showing further injury to Plaintiffs as a result of New Mexico's unlawful violations of Plaintiffs' rights as alleged in the Complaint.

The cause of action in the instant case is New Mexico's violation of Article IV(b) of the Compact. The facts alleged in the Complaint were that, as a result of the enlargement of Ute Dam and Reservoir, New Mexico was maintaining conservation storage in excess of the amount allowed by Article IV(b) of the Compact. The facts alleged in the Supplemental Complaint were that, as a result of New Mexico's continuing violation of Article IV(b) of the Compact, New Mexico was impounding water in that excess conservation storage to the injury of the Plaintiffs. The Supplemental Complaint, therefore, does not alter the

cause of action but merely alleges further injury to the Plaintiffs arising from the original cause of action.

3. *The Complaint requested sufficient injunctive relief.* New Mexico further mischaracterizes the Complaint as not requesting specific injunctive relief against the continuation of New Mexico's excess conservation storage. (New Mexico's Memorandum in Support of Motion, p. 4) The Complaint, however, expressly requested that the Court enjoin the Compact violation by New Mexico described therein (maintaining excess conservation storage capacities) and command New Mexico to take such remedial actions as may be necessary to bring it into compliance with the terms of the Compact. (Complaint, p. 10) Such injunctive relief would necessarily include reducing reservoir storage capacities to comply with Compact limits.

The Supplemental Complaint requested, in addition to the relief requested in the Complaint, that the Court enjoin New Mexico to reduce and maintain the waters in conservation storage to not more than the 200,000 acre-feet of conservation storage authorized under Article IV(b) of the Compact and for other appropriate relief. The relief requested in the Supplemental Complaint cannot justify New Mexico's request to file an untimely affirmative defense which actually is directed against the Complaint.

II.

NEW MEXICO'S REQUEST TO FILE AN AFFIRMATIVE DEFENSE OF LACHES IS UNTIMELY

New Mexico's motion for leave to file a new affirmative defense of laches is based upon mischaracterizations of the Complaint and Supplemental Complaint as discussed

above. These misrepresentations are contrary to the plain language of the Complaint and Supplemental Complaint. Their purpose is to provide some justification for New Mexico's failure to timely this affirmative defense.

Any defense of laches could and should have been made in New Mexico's Answer to the Complaint. New Mexico claims that the Supplemental Complaint alleges wrongs which Plaintiffs could have sued to prevent prior to the enlargement of Ute Dam, and that Plaintiffs should be barred by laches from any "relief against New Mexico in regard to existing dam structures, impoundment of water, or past damages in either water or money, if any." (New Mexico's Memorandum in Support, pp. 4-5)

As stated above, the Complaint sought injunctive relief against New Mexico's existing dam structures after the enlargement of Ute Dam and Reservoir created excess conservation storage in violation of the Compact. The impoundment of water and resultant damages alleged in the Supplemental Complaint are direct consequences of New Mexico's maintaining the excess conservation storage alleged in the Complaint. It is simply too late for New Mexico to raise laches as an affirmative defense to the Complaint.

It is one of the essentials of the principle of waiver of a defense that if one knows of the defense, it must be seasonably pleaded. *Bernard v. U.S. Aircoach, et al.*, 117 F.Supp. 134, 137-138 (S.D. Cal. 1953). If the moving party is guilty of inexcusable delay or laches, the supplemental pleading will not be permitted. *Wisconsin Heritages, Inc. v. Harris*, 490 F.Supp. 1334, 1338 (E.D. Wis. 1980).

New Mexico has not shown any justification for its failure to raise laches as an affirmative defense to the Complaint. It is attempting to use the Supplemental Complaint as a means to inject into the litigation a new defense which is not based on events occurring after the filing of

the Complaint, but which will burden and complicate the proceedings to the prejudice of Plaintiffs. In doing so, New Mexico has substantially misrepresented both the Complaint and the Supplemental Complaint.

CONCLUSION

Pursuant to Fed. R. Civ. P. 15(d) and Sup. Ct. R. 9.2, it is within the Court's discretion to grant New Mexico's Motion for Leave to File Supplemental Answer if the Court deems it advisable. New Mexico has not shown any good basis for the Court to grant its motion. The Court, by its Order dated December 12, 1988, may have already determined that a Supplemental Answer was not advisable.

WHEREFORE, Plaintiffs request that if the Court grants New Mexico's Motion for Leave to File Supplemental Answer, it strike New Mexico's untimely affirmative defense.

Respectfully submitted,

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